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THE FUNCTION OF A COURT IN APPLYING STATE LAW.

The above title is meant to indicate our purpose to consider the particular office of an American court under the universal principle that any party in any court is entitled to all of his rights under the law. The need for such consideration lies, or appears to us to lie, in the fact that there is widespread confusion in the minds of people as to what a judge really does when adversary litigants claim conflicting rights, each basing his claim upon alleged law.

The off-hand answer of anyone as to what is the duty of the judge in any such case is to declare, that the claim of one of the contestants has law for its support and that of the other has not. It makes no difference how the judge arrives at his conclusion, so far as his immediate duty is concerned. The essential thing is that he arrive at a conclusion. If it is a wrong conclusion, this only may be made manifest, under the law, by its being reviewed. The judge himself, no more than any other person, may not dispute the correctness of his judgment, howsoever revolting it might become either to his mind, or, if corruption intervened, to his conscience.

The decisions of a judge might be claimed, as they have been claimed, to show that one law was applied to a combination of facts in one case and another supposed law to the same combination in another case, and whether the judge admits or denies the claim is equally immaterial. The fact merely would indicate, if the claim were true, that the judge has adjudicated controversies, but not that he has set any law aside in either of them. That his intent was the latter he indignantly would deny.

How true this is may be learned from numerous cases where courts afterwards persist in a course of judgment merely upon the principle of *stare decisis*, or they declare former decision no longer shall be followed. This is the method in courts of final jurisdiction of keeping the record straight, so that transactions may be entered into in reasonable forecast of the future. But in courts of original jurisdiction a judge may be as versatile and various as a chameleon, while all, including himself, may be amazed at his genius in eccentricity.

All of this would be plain enough, if there were only one source of law and all emanations therefrom of equal dignity and binding force. Then all the court would have to do would be to construe one emanation with another and determine whether one was repealed by the other and, at all events, what is the existent law applicable to a controversy at bar. No earthly soul would for a moment conceive that an erroneous ruling in the matter would crush the true law, but all would admit that whenever a like controversy again might arise a rightful decision could be invoked and should be rendered, unless some rule of property intervened.

But the American system has complicated, at least in popular view, the thought we have been pursuing, because the nation and the states have limited spheres in legislation. These spheres are limited both in the nation and in the states by constitutions, and again there is limitation as to the states by the fact that the law of the nation is the supreme law of the land.

Taking up these limitations in reverse order, we will suppose a controversy in which one litigant claims either under a state constitution or a state statute and his adversary says there is no constitutional or statutory provision to support such claim. Is it necessarily an answer to this negation to produce an apt provision from either source? Certainly not, if there is something in "the supreme law of the land," that places such subject matter beyond the pale of state authority. The court, in such case, would decide that it finds no law that supports the litigant's claim, because the subject matter is not affected.

This position may be illustrated by supposing, that a claim is based on a statute and it is denied because this would be to give extra-territorial force thereto. In the one case the manner of determining the sphere of the law's operation is mental, and in the other it is physical, but in both the issue is one of sphere. In neither case does the court have to say that a statute or a constitution is void. It merely must say, whether a claimed right is within or without the sphere of its operation.

It is true, that the mind of the judge persuades the court to its judgment upon the essential question of sphere, but every lawyer recognizes that the reason of decision—*ratio decidendi*—is one thing and decision is another. It is fortunate, indeed, that rightful decision does not have to carry the supposed reasons for its being made.

But, if the court erroneously has defined the circumference of state sphere or erroneously has supposed that a certain claim lies outside of it, it has done nothing more than denied a citizen, who has appealed to it, his lawful right. It has not changed in any respect that circumference and any other citizen or the same citizen in a new controversy may ask the court to award him his rights, and the court will award them, if it thinks it should. The former decision has expended its force, and it is but a precedent to be respected or not according to its supposed deserts, or because of a rule of property.

If in a controversy a litigant claims a certain right and his adversary denies it and the question of legislative sphere, as constitutionally defined by the state, is the only question at issue, the court merely says, if it so thinks, that there is no intra-sphere operation of a supposed law so far as the subject-matter of controversy is concerned. It has no concern with legislation as such, but its function is to exercise jurisdiction over and dispose of a controversy in a legal way. Exercising jurisdiction and deciding upon the subject-matter thereof are so essentially different that the manner of one may be compelled and except upon reversal on appeal the manner of the other is free from every interference.

Therefore there is no possible place in a judgment as a judgment, for the pronouncement of a law's unconstitutionality. If it is there, it merely indicates that that is the mental aspect of the judge rendering the judgment. He presupposes that an alleged law, if valid, would require a contrary judgment, but no litigant nor the public is interested in what led the judge to pronounce the judgment. If a higher court conceived the judgment right and the law the lower judge thought of had nothing to do with the controversy, that judgment would be affirmed.

The prevalent error that Chief Justice Marshall essayed to settle and did settle so that there was infused into judicial power the principle, that the court might declare a law unconstitutional, has never seemed to us to have been accurately expressed, diffident as we may feel in the face of such a fame as his and admitting as we do that this manner of settlement has been accepted without question.

No one disputes that the federal constitution is the supreme law of the land, nor that federal statute is superior to state law, either constitutional or statutory. But when you say this, you say that federal statute has a sphere of operation defined by that constitution, and state constitution and statute have their spheres of operation. Otherwise expressed, every law of this country has its orbit. The federal constitution has nothing whatever to do with any law of congress or with any law of a state than to say it must confine its operation in that orbit, and its supreme court when its jurisdiction is invoked as to a particular subject-matter may say whether it lies or not therein, that is whether judicial judgment in a proceeding may affect that subject-matter.

This seems so plain to us, so far as the federal constitution concerns a state, that we do not see how it can be seriously disputed. It grants nothing to states in the

way of legislative power, but it is a check thereon. It has no concern with a state law if it does not interfere with that check and a citizen may try and try and try after a state law has been halted in its application to a given subject-matter to overcome obstacles in similar situations. All the court can say is we are still of the same mind as before. Your law is to us like one seeking enforcement in a foreign country.

But just as national law creates, so to speak, an *imperium in imperio,* so state constitutions, whenever they prescribe checks on legislation, do the like in each state. The courts rule that a certain thing involved in a certain cause has something like a tangible presence within sacred physical confines, and through logic we learn it has associates. Then also it is inferred that a law may either have no or very little practical application, because a higher law has established impassable barriers.

Therefore, when it is said that a court, not applying legislation to a given subject, is not administering the law as it receives it, notwithstanding checks on the scope of its operation both nationally and by state constitution, the reverse is true, for it *is* administering the highest of known law and disregarding whatever of inferior law would interfere with its operation. What other way is there to preserve the integrity of our system?

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW — REQUIRING STREET CARS TO CARRY SCHOOL CHILDREN AT REDUCED RATES.—The Supreme Judicial Court of Massachusetts holds, that though it appear, that the average cost of carrying a passenger by a street railway company is four and one-half cents, this does not necessarily mean that requiring a particular service within police power, where the average passenger would pay only two and one-half cents would be unconstitutional as confiscatory. Commonwealth v. Boston & N. St. Ry. Co., 98 N. E. 1075.

The particular service in this case was that children attending public schools should be carried upon half fares. As showing that such a requirement, as the exercise of police power in the interest of education might be reasonable and not entail loss to the street railway it was said: "It might be that the number of pupils who ride at the reduced fare, as compared with the number of those who would not become passengers at the full fare, coupled with the preponderance of small children and the greater carrying capacity of each car for such passengers and the well known fact that the hours of attendance at school are not the rush hours of travel do not cause actual loss."

The court then proceeds to speak of other sources of revenue, such as advertising space and the carrying of mails, and generally applies forcibly the principle, that any reasonable classification in passenger service may be made, that comes under police power, so long as actual loss for its performance is not entailed.

We do not see why, if the city may require any particular service to be done without actual profit, it may not go below that point, if upon the whole a fair profit is permitted. There seems to us something of infirmity in the conclusion, that there must be no actual loss in the performance of a particular service. If the court had said it was not shown that generally half fares for school children were not proper, because of the circumstances stated, its conclusion would, it seems to us, have been better based.

THE KANSAS "BLUE SKY LAW."

So much has been said about the so-called "Blue Sky Law" of Kansas, that our readers will, undoubtedly, welcome information on this subject from a source that is authoritative and accurate. J. N. Dolley, bank commissioner of Kansas, in an article in the *Bankers Home Magazine,* explains the operation of the law as follows:

"We have in Kansas, as you probably all know, what is known as the 'Kansas Blue Sky Law,' a law which compels all companies and agents who desire to sell stocks, bonds or other securities in Kansas to submit information to the Banking Department which will enable the Banking Department to determine whether or not their securities are worthy of the confidence of the Kansas people. We believe that this is one of the best laws ever placed upon our statute books, and that it has done, and is doing, as much if not more good, than any other statute which has ever been enacted.

At the time this law went into effect there were between four and six millions of dollars annually being taken from Kansas which was

absolutely lost to the investor as well as to the State of Kansas. Postmaster General Hitchcock after careful investigation estimates that there is $300,000,000 annually lost by the investing public of the United States. This money was being taken by the promoter from our state to the headquarters of his company, a large per cent of it going to New York and the East and 98 per cent of it was either borrowed from the banker or taken from his deposits.

Up to this time about 800 companies of various kinds have applied for permission to do business in Kansas under our Blue Sky Law. About half or over of these have been mining, gas and oil companies. I believe I am safe in saying that where there has been one dollar invested in mining, oil and gas stocks there has been 98 cents lost. Out of the 800 applications which have been filed but about 70 have been granted permission to do business in Kansas, and the greater majority of those granted have been for Kansas industrial and home enterprises. The larger part of the 800 never get farther than making the application. It was not necessary for us to turn them all down. As soon as they found out what information we were going to ask them for and what the nature of our investigation was going to be they suddenly changed their minds and withdrew their applications. The most of them have a prospectus and financial statement that makes a fine showing, but when you compare these statements with their books and the facts they do not correspond.

When a company brings its application to our department they are candidly informed that if there is anything wrong with their proposition, if any one is getting a graft out of it, or their proposition is not strictly a business proposition, they will be flatly refused permission to do business in Kansas. You would be surprised at the number of them who write us in a few days afterwards, stating that they had unexpectedly sold a large amount of stock or give some other excuse and wish to withdraw their application at once.

The legitimate companies are rapidly getting behind the law and complying with its provisions if they have any securities to offer the public. We do not attempt to say that a company that secures a license from this department is a first-class investment and a sure thing, that is not the intent and purpose of the law, but the permit is a notice to the public that the company is at least being handled honestly and upon a business basis and has reasonable prospects of success, and, further, that if there is anything made the stockholders will get it. With one of these permits it is no trouble at all for a good, legitimate company to place its stock and finance itself in a very short time.

It has been said that the people do not need a guardian to supervise their investments. Why not? Bankers are subject to the very strictest of supervision. Almost every state in the union has a Banking Department to regulate and supervise the banks. Why should the bank be regulated and supervised any more so than the stock selling company? History and statistics show that losses through banks are but a drop in the bucket compared with the money which is lost through investment in worthless stocks and bonds.

The enemies of legislation of this nature have criticised our law, and say that it is not possible for a bank commissioner to judge all kinds of companies and tell whether or not they are a good investment. In order to be a good banker one must be a good business man, and you will generally find a good banker as bank commissioner. I agree with the critics that it is not possible for a bank commissioner to judge them all, and in my case he does not try to. We have the co-operation and assistance in these matters of our various other state institutions, our State University, our Agricultural College, our Insurance Department, etc. Whenever we get an application from a company we get what information we desire and then it is submitted to one of our various state institutions or departments, who are experts in that line, and we receive their advice and opinion regarding the matter. For example, a company recently came to the department with a new electric battery, which they claimed was going to revolutionize the electrical world. This matter was presented to us by a citizen of the State of Oklahoma. He had endorsements from a number of prominent bankers and business men. He presented his battery to one of our large railroads for tests, and they advised me that, while they had not gotten through with their tests as yet, it looked like a marvelous thing to them. We at once presented the matter to the electrical experts at our State University, and they advised us within thirty days that the battery was an absolute fake, and would not do what the company claimed for it. Their permit was immediately refused.

The same is true of a number of insurance propositions which have been submitted to our insurance department, and which have been refused permission to do business in Kansas after a careful analysis of their statements by the experts in that department.

Kansas is the first and only state to have a law of this kind. We have received requests from nearly every state in the union for copies of the law, and there are a large number of the states that will have similar legislation as soon as they can assemble their legislative bodies. The law has been written about by the leading magazines of the world, all over the United States, as well as England, France, Germany, Canada, Holland and a number of others. The governments of England, Germany and Canada have requested copies of the law and are now considering the enactment of a similar law.

This law has already saved the people of this state more money than it takes to run our entire state government during the time which it has been in operation. I can show you one instance where a certain company were selling their securities in Kansas at the time this law went into effect at the rate of about $300,000 per month, having some thirty salesmen in the state. After making a careful investigation of their proposition this company were refused permission to do further business in the state, and they have since proven themselves unworthy of the confidence of the public.

When a stock salesman approaches a Kansas investor, one of the first things the investor demands is to see his permit. If he does not have the permit the investor immediately advises our department or the county attorney and the agent is at once taken into custody. We are not troubled very much with them doing business without a permit, as the law provides such heavy penalties that it is not violated. The law provides penalties all the way from one to ten years in the penitentiary, and from $100 to $10,000 fines. It has only been necessary for us to make a few prosecutions.

The promoter is one of the few characters in life who thrives on failures. His history is honeycombed with wreckage, and from each wreck he emerges with plenty of money and erects a new company on the ruins of the former failure, or perhaps in new fields, from which he makes more money than he did from the former enterprise. And while the widows, orphans and the poorer class of people, who form the investing public, are sparing themselves some of the real necessities of life, the promoter is all the time living like a millionaire and lavishly spending the money which he has absolutely stolen from them.

Our people must be protected along these lines, and it is our duties as American citizens to see to it that such legislation is enacted and such steps taken as will protect them."

A. H. R.

SOVEREIGNTY.

Americans everywhere are familiar with the somewhat paradoxical idea of multiple sovereignties. The doctrine of state rights, the controversy which raged so fiercely for nearly a century between those who asserted the supremacy and demanded an extension of the powers of the national government, and those who opposed such extension and asserted the right of the state to nullify the acts of Congress, familiarized everyone with the notion of a state sovereignty, co-existent with a national sovereignty. But this notion had by no means the content which sovereignty, as defined by Blackstone, denotes, save in the minds of those who failed to see that sovereignty, as thus defined, could not admit of division or distribution. A power which is absolute, supreme and uncontrolled, cannot coexist with any other absolute, supreme and uncontrolled power. This was obvious, and was fully recognized by federalists and states rights men, except when they closed their eyes to the fact, or when they allowed the heat of controversy to obscure their vision. But it was said that states sovereignty and national sovereignty meant merely that the states within defined limits had absolute power, while the national government, within limits as clearly defined had absolute power, or, (with a greater approach to accuracy), that the people of the states and the people of the nation had severally such power. But to those who adhered to the Blackstonian idea of sovereign power it was manifest that there could be no division of that power and that it could reside nowhere else than in the people of the United States, considered as a corporation sole. The provisions of the federal constitution for the preservation of a republican form of government for each state and the necessary, and, because necessary, the implied reservation of power to Congress, to control the admission of new states into the Union, suggested as did also the history of the troublous times of the Confederacy, that the

men who met for the purpose of framing a Constitution for the United States had in mind something very like the Blackstonian idea of sovereignty, and were not confused by any notions of multiple sovereignties.

This sort of confusion is very readily produced if the agencies of sovereignty are not clearly distinguished from sovereignty itself, viz., the whole body of the people regarded as a corporation sole. Such is now the American conception of sovereignty. The most strenuous advocate of states' rights does not now contend that the people of a state are sovereign. The most earnest opponent of an extension of federal powers admits that the people united under the federal government constitute "the sovereign people" and, that the people of each state owe allegiance to the sovereign so constituted. The sovereign cannot act otherwise, or, at least, does not act otherwise than through agents. It is often said that the constitution was the work of the people in their sovereign capacity. But it is more accurate to say that it was the work of the agents of the sovereign people. The members of the convention were mere representatives, mere agents, just as the members of Congress are mere representatives. It is true, of course, that the constitution was adopted and ratified by the states in a manner different from that in which acts of Congress are ratified. But the acts of adoption were the acts of legislative bodies, acts of the state legislatures; the electors did not express their approval by severally voting for the adoption of the constitution as is now customary in the states when a new state constitution is adopted. But a direct vote of adoption would not have made the constitution the creature of the whole people, in a sense different from that in which acts of Congress, at least after they have been judicially approved, may be said to be the work of the whole people, unless, indeed, the whole people had not merely voted upon the question of adoption, but voted for it. If every man, woman and child upon whom the constitution was binding had voted for its adoption, then it could, with some degree of accuracy be said to have been the work of the whole people. But even so there would have been large numbers whose ballot would have been a mere mechanical mark representing nothing that could rightfully be regarded as an intelligent act of adoption. Moreover, although, every man, woman and child had on a given day voted for the adoption of the constitution, the whole people, thus voting for and making the constitution their handiwork, would not be the people upon whom, even in its earliest inception, it would operate. The morrow's sun would rise upon a different people from those upon whom it set on the preceding evening. Death would have removed many, while many others would have been born into the world, and subject to the constitution in the making of which they had no share. Many immigrants would have arrived in the country with a view of making it their home, but with no understanding or even knowledge of the existence of the constitution. So that under no possible circumstances could the constitution be regarded as the work of the whole people.

If the whole people constitute sovereignty, the constitution was not the work of the sovereign, and it must be regarded as the work of the agents of the sovereign. As a matter of fact, only a very small portion of the people had any share, as agents or otherwise in its making. And even the constitutions of the several states which were adopted by popular vote were none the less adopted by the mere agents of the whole people. Probably in every instance there were many who voted against the adoption of the constitution submitted to them. In many instances the vote for and against was small, and although no constitution was adopted save where a majority of those voting, voted for adoption, still in many instances that majority was but a small proportion of the whole people; the adopting agents were few in number compared with the people of the state (not

sovereign people, because owing allegiance to the real sovereign people who had through their agents draughted a constitution and established a government binding upon the people of all the states) upon whom the constitution was binding.

It should not be necessary then to point out that valid acts of Congress are as much the work of the sovereign people as is the federal constitution. Congress acts as the agent, but it is not the only agent of the people. The federal courts represent and act for the people as superior agents, or at least as agents upon whom devolves the duty of testing such acts of Congress as are submitted to them by litigants in suits at law. The people are content to await the action of the supreme court in passing judgment as the exigencies of litigation may require. The courts, as superior agents of the people may never be called on to give their judgment. Certainly the great majority of the Acts of Congress are never submitted to them for a judicial judgment upon their constitutionality. Theoretically, therefore, the people must be regarded as giving a quasi-approval to all acts of Congress as they are enacted, subject to revision in the case of such acts as may be declared invalid by the supreme court. This quasi-approval, this approval revised in the case of acts found void by the supreme court, is the method by which the people ratify and adopt the work of their agents, the Senate, the House of Representatives and the President of the United States. There is no formal act of adoption or ratification. As we have seen, there could be no formal act of adoption or ratification by the whole people. But the tacit approval involved in submission to the laws and by acquiescence in the methods by which these laws are made is as much an act of adoption as any method by which constitutions are said to be adopted by the whole people. A formal vote as in the case of state constitutions is only important to prevent the adoption of a constitution which does not express the real desires of a majority of the people. Acts of Congress may sometimes be opposed to the real wishes of a majority of the people, and for this reason an occasional referendum of important acts, such for instance as the income tax law of 1895, would probably prove beneficial. But it is also clear that without any such express approval, valid acts of Congress are as much the work of the sovereign people as any constitution can be.

It is important to keep this fact clearly in mind, for otherwise much confusion will arise in comparing the sovereign of the United States with the sovereign of other nations. The notion that the relation of the American sovereign to the constitution is different from the relation of the American sovereign to the acts of Congress is chiefly responsible for the notion that the American sovereign is quite different from other sovereigns. Writers upon constitutional law have fallen into the habit of assuming an essential difference between sovereignty in America and sovereignty in England. The latter, they say, is vested in the king and parliament, but the former has been reserved by the people to themselves. A little consideration will, I think, show that a sovereignty which is capable of being vested in a king, or in parliament or in both combined, is a mere legal fiction. It is, in fact, ridiculous to suppose an absolute, supreme and uncontrolled power as residing in a single man. Nor is the supposition less ridiculous which attributes such power to a few score men or to a few hundred men, while they are members of parliament. The power which a nation possesses must necessarily reside in the people. The sovereign power by which all resistance to constituted authority can be overwhelmed must necessarily reside in the people. Such power cannot by any possibility be transferred to a king or to a relatively small body of men. A constitution may create a chief magistrate, it may describe or refer to him, as president, or dictator, or king, or emperor; it may purport to clothe him with absolute authority, to be exercised in the manner pointed out by

the constitution. But absolute authority is a very different thing from absolute power, and even absolute authority is not a thing which can be reduced to writing "on paper or parchment." Authority implies a person or persons capable of conferring it, and a person or persons upon whom it can be conferred. It implies also that the persons who have power to confer authority have also power to revoke it. The continuance of authority, therefore, requires the acquiescence of those who, if they would, could terminate it. All that so-called absolute authority confers is a recognized right to command. This right to command is of force only in proportion as it is recognized, and supported by the will of the people at large or by some active portion of them. Before authority can assume the form of power, it must have the moral support of those in whom the power resides. These may be the police, the magistracy, the constabulary, the militia, the regular soldiers, the sheriff with the power of the county, and the great body of the people. The strength of this moral support will be the measure of the power which absolute authority can command. The power can in no case be transferred from the people to the king, the president or to parliament. Sovereign power must necessarily, in every nation, regardless altogether of its form of government, reside in the people at large. The term, the sovereign people, is as truly descriptive of the English, as of the American people, and may with propriety be applied to any people forming an independent nation. It might seem strange to speak of the sovereign people of Turkey or of Persia, but only because Americans are accustomed to think of the term as peculiarly applicable to themselves by reason of the peculiar form of their constitution. The nature of sovereign power is quite as consistent with a monarchical form of government as with a republic, and with an absolute as with a limited monarchy, but a constitutional provision prescribing the method by which a constitution may be amended or revised and limiting that method to some form of legislation more in touch with the people's will than is ordinary legislation, is peculiar to American constitutional law.

The distinguishing feature of constitutional government consists of the ease with which the sovereign power or some portion of it, that is to say, the will of the people or of some portion of them, can be applied in practice to the ordinary functions of government. The reservation of sovereign power to the people, so far from being a distinctive feature of American law, is a feature pertaining to the laws of all nations, not indeed that such power is expressly reserved, but that its reservation is a moral and physical necessity because of the simple fact that one man's energy cannot be transferred to another.

It is, of course, only by a legal fiction that the whole people of a nation can be regarded as a corporation sole. Its corporate action must always be through agents, and a multitude of agents are now employed in the work of government where there were formerly but few employed. Nevertheless the corporation action of the nation is as binding upon each individual as it would be if it were the action of the individual himself, and indeed, more so, and hence the fiction by which the sovereign people can be regarded as a corporation sole is not more absurd than that which imputes corporate existence to the king.

When, however, one comes to examine the real nature of sovereign power, he sees that it is very far from being supreme, absolute or uncontrolled. In the first place, the action of every nation is controlled by the common sense and common morality of mankind. The nation that would dare enter upon a war of wholesale conquest would soon have every other nation arrayed against it. Its potency in war is, of course, relative, and it is non-

sensical to speak of it as absolute. But it is in war alone that anything like the whole power of the people becomes active and coherent, and only in wars which threaten a nation with annihilation, such, for example as the late South African war. The Boers undoubtedly exerted themselves to the utmost, and the exertions of all were directed to the single object of defense against the British. It is seldom that the whole sovereign power is thus directed towards one end. In the American Civil War one part was arrayed against the other, and there was nothing like the spontaneous and united action in either North or South as that which the Boers displayed. Much less is the ordinary political action of the sovereign united or spontaneous. In political action the moral rather than physical energy of the people is displayed. But it is displayed in opposing factions, when it is displayed at all. It is the agents of the sovereign people who enact and execute the laws, not the people as a whole; their ratification of the agents' acts is passive rather than active, although the current discussion of political affairs generally may be regarded as involving more or less moral action. Such discussion is the method by which political sentiment is created and crystallized ready for the more energetic action involved in a political election. It is through this political sentiment thus formed and crystallized that the sovereign power of the people, or rather the active portion of it, operates indirectly upon legislation and government. Instead of being supreme, absolute and uncontrolled, it is weak, wavering and ebullient, in large degree subject to the domination of the political boss, to the briber and to the various influences by which the few who are eager for office seek to gain the support of the many whose time and energies are very largely absorbed in the struggle for a livelihood.

W. A. COUTTS.

Toronto, Canada.

COMMERCE—TERMINI WITHIN STATE.

TRAYNHAM v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. July 13, 1912.

75 S. E. 381.

Plaintiff purchased a car of guano which was delivered for transportation from Charleston, destination at Barksdale, both within the state, a part of the route over defendant's railway, however, being through the state of Georgia. Held, that such shipment constituted interstate commerce, since the transportation was and hence was not subject to Act Feb. 15, 1907 (25 St. at Large, p. 490), imposing a penalty on carriers for delay.

GARY, C. J. This is an action for the recovery of a statutory penalty and for damages alleged to have been sustained by the plaintiff in consequence of an unreasonable delay on the part of the defendant in transporting certain articles of merchandise.

The allegations of the complaint, material to the consideration of the questions involved, are as follows: "That heretofore, to wit, on the 4th day of March, 1907, the Ashepoe Fertilizer Company delivered to the Atlantic Coast Line Railroad Company at Charleston, S. C., ten tons of guano, consigned to Z. R. Traynham, at Barksdale, in Laurens county, and state aforesaid. That at Yemassee in the state aforesaid, on March 5, 1907, the Atlantic Coast Line Railroad Company delivered the car containing said guano to the defendant the Charleston and Western Carolina Railway Company for transportation to the plaintiff at Barksdale, S. C. That the distance between Yemassee and Barksdale, both of which are in the state of South Carolina, is not over 200 miles by the nearest railroad route. That although the said car of guano was received by the defendant on March 5, 1907, and the defendant was requested to make prompt shipment thereof, the said car of guano was not delivered to the plaintiff, until the 6th day of April, 1907. That, by and under the statute law of South Carolina, all common carriers doing business in this state are required to transport to its destination all freight received by them for transportation, not exceeding the following limit, * * * and for failure to comply with the said statute, such common carrier so failing shall be subject to a penalty of $5 per day for every day of delay in excess of the time hereinabove limited."

The defendant denied that the delivery of the guano at its destination was unreasonably

delayed, and alleged that the delay was caused by an unusually heavy movement of freight at that time over the line of the defendant, which caused its yards and tracks to be blocked at the transfer points, and made it impossible to reach the car and move it at an earlier day. The defendant also alleged that the shipment was subject to the laws relating to interstate commerce, and not to state legislation, by reason of the fact that the defendant's line of railway, over which the guano was being transported, lies partly in the state of South Carolina and partly in the state of Georgia. The jury rendered a verdict in favor of the plaintiff for $60, and the defendant appealed.

The testimony shows that the shipment began and terminated at its destination in this state; that a part of defendant's line, over which it was necessary for it to transport the goods, lies within the state of Georgia.

The first question that will be considered is whether it was an interstate or an intrastate shipment. The cases of Sternberger v. Railway, 29 S. C. 510, 7 S. E. 836, 2 L. R. A. 105; State v. Holleyman, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567; Frasier & Co. v. Railway, 81 S. C. 162, 62 S. E. 14; Hunter v. Railway, 81 S. C. 169, 62 S. E. 13; and Hanley v. Kansas City Ry., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, determine beyond question that it was an interstate shipment.

In the case of Hunter v. Railway, 81 S. C. 169, 62 S. E. 13, the same railroad company was involved, and the facts in every respect were similar to those now under consideration, except in that case the delay occurred in the state of Georgia. The title of the act then and now before us for interpretation is: "An act to prevent delays, in the transportation of freight, by railroads in this state." The first section provides: "That from and after May 1, 1904, all railroad companies, doing business in this state, shall transport to its destination all freight received by them for transportation within the state. * * *" 24 St. at Large, p. 671. In that case the court used this language: "Construing the words 'transportation within the state' according to their exact and natural meaning, they do not embrace interstate transportation. (Citing authorities.) The statute, therefore, cannot have operation beyond the territory of the state, and should not be so construed as to interfere substantially with transportation in its interstate feature. * * * Transportation is a part of commerce, and it must be held that the transportation in this instance was not wholly within the state, but was in part within the state of Georgia, and was therefore interstate transportation." If no other language had been used by the court in that case, it would be unnecessary to cite authorities to show that the statute of this state is inapplicable. But the court left open the question whether a case is embraced within the terms of the statute when the delay takes place wholly in this state.

In Hanley v. Kansas City Ry., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, the court quotes with approval the following language from Pacific Coast S. S. Co. v. Railroad Commissioners (C. C.) 18 Fed. 10, 9 Sawy, 253: "To bring the transportation within the control of the state as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state."

An interstate transportation is continuous in its nature, and, if a state statute could have the effect of breaking the continuity of transportation, it would necessarily interfere with interstate commerce. State v. Holleyman, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567. As an interstate transportation must be regarded as an entirety, it is difficult to conceive how a delay may take place within a state without being affected by causes operating at some other place on the line of railroad, even in another state. It would certainly be an onerous burden on interstate commerce to hold that a shipment, during its actual transportation, could be subjected to state legislation at any point on the line whatever, before it reached its destination.

It is the judgment of this court that the judgment of the circuit court be reversed.

WATTS, J., and ERNEST GARY, COPES, PRINCE, SPAIN, FRANK B. GARY, and SHIPP, Circuit Judges, concur.

NOTE.—*When Transportation Between Two Points in Same State is Interstate Commerce.*—It would seem, that the conclusion of the principal case, that the shipment considered was interstate and not intrastate, has been settled by the U. S. Supreme Court in the way the majority opinion in the principal case holds. But one of the dissenting opinions reasons upon the matter as follows: "Commerce is the interchange of commodities between the contracting parties. Where they are citizens of different states, our scheme of government has placed the control in the federal government, which is common to both. Where the contracting parties are citizens of the same state, the control is assigned to the state of which both are citizens. The line of division between these two ought to be clearly defined."

This is a very misleading statement. It seems to us to make no difference about diversity or identity of citizenship in determining whether a transaction is interstate or intrastate, or whether either of the contracting parties is a citizen of any state. The question is whether there is an arrangement for commerce or the subject of com-

merce passing from one state to another. If there is, Congress may regulate the means of its transportation. The real question is whether a mere physical occupation of another state by this means, in carriage between *termini* in the same state is to make the subject of commerce pass from one state to another. This, it is seen, is a mere incidental circumstance. It does not affect the real nature of a transaction or its shipment, and the very existence of the circumstance might be unknown to the contracting parties.

This seemed to be the thought in the case of Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, where the question was of the validity of a state tax upon a railroad on transportation done by it from one point to another in the state, where between the points the railroad passed into and out of another state. It was urged that, notwithstanding the tax was for the proportion of transportation within the state, it was unlawful because "the transportation was an entire thing."

Chief Justice Fuller said: "There was no breaking of bulk * * * in New Jersey. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such continuous transportation between two points in the same state made interstate because in its accomplishment some portion of another state may be traversed? Is the transmission of freight or messages between two places in the same state made interstate business by the deviation of the railroad or telegraph line onto the soil of another state?"

The Chief Justice speaks of engineering difficulties having caused such a deviation and remarked: "But we had not supposed that that circumstance would render taxation of" the company thus deviating because of physical obstacles invalid. He proceeds to distinguish as to ocean voyages between points in the same state, because of the power to regulate the liability of owners of vessels navigating the high seas.

Some years later the question arose whether state railroad commissioners could regulate rates between points in the same state, where the railroad crossed another state between the points, and it was held they could not because this was interstate commerce. Hanley v. Kansas City So. Ry. Co., 187 U. S. 617, 42 L. Ed. 759. There was greater mileage in this case outside of the state than in it, and Justice Holmes thought there should be regulation by one authority only and it could not be split up between the two jurisdictions in which the road lay. Mr. Justice Holmes thought: "The transportation of these goods certainly went outside of Arkansas and we are of opinion that in its aspect of commerce it was not confined within the state."

He alludes to the fact that there are a number of state decisions to the contrary "made simply out of deference to conclusions drawn from Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S. 192, and we are of opinion that they carry their conclusions too far. That was the case of a tax and was distinguished expressly from an attempt to regulate the transportation while outside its borders. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes."

All of this would seem to show that the fact of both *termini* being in the same state has something of consideration about it, when the question of state legislation is concerned. But, after all, the question is an administrative, rather than a strictly legal, one. Whatever may have a substantial tendency to interfere with Congress in regulating transportation between states it may condemn, whether in some way it is an intrastate thing that interferes or not, or howsoever it may otherwise be described. If transportation get over into another state one hundred feet and there is no breaking of bulk it is negligible. If it gets over 100 miles it may be condemned absolutely. It is not a technical question. C.

CORAM NON JUDICE.

AROUSING THE PUBLIC MIND AGAINST THE JUDICIAL PREROGATIVE TO DETERMINE THE CONSTITUTIONALITY OF LEGISLATION.

In these days no institution is so sacred nor no precedent so firmly established by long usage as to escape the query: "Why do you exist?" or "Why should you not now be discarded?"

This question is being especially directed against the right of courts to hold legislation passed in the interest of the public welfare to be unconstitutional. And the discussion of this question is being fanned into a fury by reputable lawyers everywhere.

Recently, we employed the Argus Press Clipping Bureau to furnish us with clippings of the published declarations of lawyers on this and other questions, and were surprised to learn how many reputable lawyers are engaged in fanning the flame of the public discontent against what is called the "great usurpation of American courts" in declaring legislation unconstitutional.

Possibly the most frequently published address is that recently made by Judge Gaynor on the theme, "Do Our Courts Stand in the Way of Social and Economic Progress?" All over in flaming double column leaders has this address gone, arousing the people but not enlightening them, urging the destruction of a judicial prerogative without explaining how such prerogative can be taken away without also abandoning the constitution itself.

Probably the most prominent editorial comment on Judge Gaynor's address was a black letter double column editorial in the Philadelphia Evening Times.

This comment furnishes a succinct review of the salient points in Judge Gaynor's address and we reproduce it here. The Times says:

"Do Our Courts Stand in the Way of Social and Economic Progress? To this Judge Gaynor replies:

'Yes, they do, and have done so for a long time. But this is nothing new. In all ages and pretty much everywhere the courts have tried to apply their legal rules of thumb to social, commercial and economic matters, always with signal failure, and generally with injury to industry, commerce and the social good.'

Nothing is more distressing than to see a bench of judges, old men as a rule, set themselves against the manifest and enlightened will of the community in matters of social, economic and commercial progress.

The same is true in matters of moral and religious growth. * * *

'The adverse decisions of courts have not been able to stop human progress. Sometimes they baffle it for the time being. Sometimes by creating exasperation in the intelligent mind they accelerate it.

Instance: When the United States Supreme Court, in sending the negro boy, Dred Scott, back into slavery, only hastened the coming of the Civil War.'

The Mayor later takes up the tenement house tobacco case, decided by the Court of Appeals of New York State in 1885.

Interested persons had succeeded in having a law passed by the legislature forbidding the manufacture of tobacco in tenement houses because of its evil effect on children.

The court held the law to be unconstitutional.

A bill was passed regulating hours of work and sanitation in underground bakeries; but this also was declared by the court unconstitutional.

The Court of Appeals found unconstitutional the law limiting the working hours of women.

Commenting on these and such cases where the behests of interested parties control judgment, the Mayor said:

'It is not at all to be wondered at that such decisions should provoke a widespread dissatisfaction with the courts. The just feeling pervading the community is that a bench of judges is no more competent than the Legislature to decide as to the wisdom or necessity of such laws. * * * That is a matter of enlightened opinion, which the courts have no right to arrogate unto themselves. The courts of England do not do it nor do the courts of any other country. And ours base the right to do so on fundamental or constitutional provisions for the safety of liberty and property which are not peculiar to this country at all, but are to be found in all systems of government and jurisprudence. No such meaning was ever given to these safeguards of property and liberty until by the judges in this country. It is judge-made law, pure and simple.'

To the question, "Does the Legislature represent the community?" Mr. Gaynor replied: 'No; the judges took that unto themselves. They judge thereof over the heads of the Legislature and declare legislation unconstitutional which exceeds their opinion of what is economically or socially wise or beneficial. They have set themselves up as the protectors of society against the law-making power, safeguarded as it is by the consent of the two Houses and the Executive veto.'

In other words, that third part of our government named the judiciary, governs and controls those other divisions named the Legislative and Executive, despite our constitution and our State Constitutions, which say the law-making power is vested in the legislature.

Mr. Earle, however, while taking practically the same stand, dwells more particularly upon its daily political aspect. He said payment of political debts by appointments to rich receiverships and patronage of hundreds of thousands of dollars in value, by judges who owe their places on the Bench to their political more than to their judicial attainments, is a custom in this (N. Y.) city.

'Outrageous violations of the rules of practice so that litigation is a battle of wits instead of law, and one in which the judge is usually a mere umpire and not a real presiding judicial officer,' is another charge made by Mr. Earle, who also says:

'Is there a lawyer in New York who ever represented a litigant that was not questioned at length on the politics of the case, before what judge the case may come, what his political affiliations are; does he know the lawyers on the other side, and their politics? Generally the lawyers themselves are busy far in advance, studying the assignments and figuring the political aspect of an ordinary civil action. The public knows that politicians are constantly appointed to remunerative positions by the Bench as a reward for their political activities. Litigants hear lawyers expressing the hope that their cases will not be sent to certain judges, because of alleged racial leanings, political animosities or affiliations of the judge and opposing counsel, or the flat statement, the judge is incompetent. * * * Trials are often all hurry, wrangling improprieties, puerile arguments, sharp practice, and ingenious efforts to get on the record an error that will reverse the case.'

To the intelligent business man of to-day, a trial is a contest of wit, sharp practice, bullying and chicanery before a political officer called a judge. The lawyers usually misconduct themselves, pervert the facts and appeal to the prejudice of a jury that knows little if anything of its duties."

We count ourselves equally as liberal and as progressive as anyone but we cannot see anything but criminal folly in attempting to inflame the mind of the people against their judiciary as if the judiciary had suddenly become traitors and usurpers, and dangerous to the public welfare. The courts are not doing anything now which American courts have not always done for a hundred years past with the acquiescence of the people themselves. It is too late now to call men like John Marshall usurpers. If a change is desirable let a change be suggested without charging the judiciary with the responsibility for existing conditions and causing the people to lose confidence in an institution which belongs to them and which we believe to be as efficient to-day and as far above suspicion as any judiciary ever has been in any age and in any nation. A. H. R.

CORRESPONDENCE.

REFORM IN PROCEDURE—A PROTEST.

Editor Central Law Journal:

The great desideratum of reform in procedure is to increase the efficiency and promptness and decrease the expense of litigation. The lay mind takes no account of the labor and skill of the lawyer, how either of these shall be reduced; the professional mind seems to have considered little else. Witness: "Argument in Favor of

Tentative Suggestions,'" etc., 75 Central Law Journal, 168.

The abolition of terms of court in favor of a continuous session, and the consequent elimination of the half-yearly or quarterly return day, will, of course, expedite the hearing of cases to some extent; in the large centers of population this plan may be feasible, but the added cost of continuous terms in the country districts, as the courts are now organized, is probably prohibitive; at any rate, the gain is not worth the cost.

What time would be saved by the abolition of the bill of exceptions, and how much greater, if any, is the cost of the transcript of the oral proceedings under one name than under another? Admitting there are some technicalities or formalities to be observed in the matter of making and filing the bill of exceptions, what other business has the lawyer but to know and observe these rules, and to be so familiar with them that their existence serves the purpose for which they were designed, viz: The orderly and efficient presentation of his case to the appellate court?

Motions for new trial and in arrest of judgment would seem too valuable to be eliminated. Granting a difference of opinion on this point, what is saved in the elimination? The time spent in their consideration is practically nil.

If it be sought to so simplify procedure that the unprofessional may attend his own case, or to relieve the professional mind of its burden of knowing the rules of procedure in the courts, so that the incompetent and the sluggard may not fail, is anything added to the orderly administration of justice? Does it not tend rather to confusion and disorder? And may the rules be made so simple that procedure in order may be wholly dispensed with? If any rules of procedure be retained at all, will not there still be some who will not learn?

If the object be to give to the thoughtless, unstudious dullard the same efficiency and skill as that possessed by the shrewd, studious thinker, it is love's labor lost; there will always be the competent and the incompetent, the sharp and the dull, the thinker and the thoughtless—the success and the failure, in law as in every other branch of human endeavor. The competent makes no complaint; he accomplishes sucess with the tools at hand; it is his delight to surmount the obstacles, to find the way, to know the path which cannot be made so simple the fool will find it.

The real monstrosity of the reformer's dream is the abrogation of the substantive law for the tyranny of "judicial discretion"—the technical term for partiality, oppression, injustice, corruption. "Hard cases make bad law," is a maxim old and true; the substitution of a personal standard of right and wrong for the application of settled principles is not less dangerous than the abolition of the constitution. The search of appellate courts for reversible error because, in the minds of the judges of the courts, the particular case in hand is a hard one under the application of the substantive law has done more to bring about the present state of dissatisfaction with the courts than all the technicalities of procedure could ever do. Every appellate judge who has reversed a case "on the nominal ground that there was a technical error, when the real ground has been that the verdict has been for the wrong party," has committed a crime against the law that deserves impeachment. Who shall say that is unjust which the law has declared to be just? Who shall say, when a litigant has had one fair and impartial trial, with every right preserved, that he has been the victim of injustice? In other words, who shall be supreme, the law or the judge?

J. D. GUSTIN.

Salem, Mo.

REFORM IN CRIMINAL PROCEDURE.

Editor Central Law Journal:

I have noted the articles in your recent issues on the Reform of Procedure in Court, etc., and note the fact that no suggestions come from your correspondents advising reform in Criminal Procedure.

In my humble judgment, the criticisms of the people and newspapers and magazines, apply more directly to the criminal than civil procedure, based usually on the delays and oftentimes ultra technical objections raised so successfully on behalf of the criminal with money; that his conviction is extremely difficult and often impossible. Remove a lot of the bunglesome technicalities in the criminal procedure and the many burdensome so-called "safeguards" thrown around the criminal in his trial in court and the majority of the discontent and criticisms will end.

Very truly yours,

JOHN H. CRAIN.

Fort Scott, Kan.

[We share our correspondent's views as to the importance of reform in criminal procedure and shall have something important to say on this subject when we review the Fourth Annual Meeting of the American Institute of Criminal Law and Criminology, held at Milwaukee, Aug. 29-31, 1912.—Editor.]

HUMOR OF THE LAW.

An Irishman, a newly appointed crier in the County Court of Australia, where there were a great many Chinese, was ordered by the Judge to summon a witness to the stand.

"Call for Ah Song," was the Judge's command.

Pat was puzzled for a moment. He glanced slyly at the Judge, but found him as grave as an undertaker. Then turning to the spectators, he cried out in a loud voice:

"Gentlemen, would any of yez be good enough to give his honor a song?"

John G. Johnson, the famous lawyer and no less famous art expert, was talking at a dinner in Philadelphia about some of Sargent's cruelly realistic portraits.

"Sargent once painted a Philadelphia woman," Mr. Johnson said, "and when the work was finished, the lady's coachman called for it.

"As the coachman was studying the portrait, Sargent said to him:

"'How do you like it?'

"The man answered, thoughtfully:

"'Well, sir, ye might have made it a little better lookin', mebbe; but if ye had, ye'd have spoilt it.'"—St. Louis Globe-Democrat.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Assault and Battery**—Self-Defense.—A criminal assailant on another's home has no right of self-defense in the prevention of his pursuit and capture.—Brubaker v. Bidstrup, Mo., 147 S. W. 541.

2. **Assignments**—Priority.—Where the contractor, who had agreed to transport, erect, and paint the steel work for a subway, assigned all claims due from the builder, and the builder, after acceptance of the assignment, to enable the contractor to complete his contract, made him advances, the contractor's assignee has priority.—Homer v. Shaw, Mass., 98 N. E. 697.

3. **Bailment**—Lien.—The fact that plaintiff had not paid for suits which a tailor made for him did not give the tailor a lien upon other suits which plaintiff delivered to him to be pressed.—Owcharoffsky v. Lambert, 135 N. Y. Supp. 599.

4. **Bankruptcy**—Adjudication.—A bankrupt who made no defense to the adjudication, filed his schedule, and appeared generally in person and by attorney held not entitled to a vacation of the adjudication without showing that fraud was practiced on him.—In re Gill, U. S. D. C., 195 Fed. 643.

5.——Amendment.—A creditor who has proved a claim against a bankrupt as unsecured may, after the lapse of a year from the adjudication, amend the proof so as to show that it is secured unless the circumstances are such that, under the general rules of law applicable to like transactions, he would in other tribunals be estopped.—Maxwell v. McDaniels, C. C. A., 195 Fed. 426.

6.——Chattel Mortgage.—A chattel mortgage of a shifting stock of wines, liquors, cigars, etc., the mortgagor retaining possession and retaining the proceeds on sales thereof, was void both as to existing and after-acquired goods, as against the mortgagor's other creditors and his receiver in bankruptcy.—In re Noethen, U. S. D. C., 195 Fed. 573.

7.——Concealing Assets.—Individuals could be guilty of conspiracy to conceal assets of a bankrupt corporation, even if it could not be charged as a conspirator.—Roukous v. United States, C. C. A., 195 Fed. 353.

8.——Creditors.—A creditor of a bankrupt, who does not prove his provable claim in the bankruptcy, may sue thereon in a state court subject to the power of the court of bankruptcy to stay prosecution thereof until after the question of the bankrupt's discharge has been disposed of.—In re Camelo, U. S. D. C., 195 Fed. 632.

9.——Discharge.—A bankrupt, who obtained credit for additional goods by false statement of financial condition, and who subsequently made payments on prior purchases so that his debts at the time of bankruptcy were less than his debts at the time of making the false statement, made materially false statement precluding his discharge.—In re Arenson, U. S. D. C., 195 Fed. 609.

10.——False Oath.—A specification that a bankrupt applying for a discharge knowingly made false oaths in relation to proceedings in bankruptcy, made false answers to petition for his adjudication as a bankrupt, made false oaths as a witness in the proceeding resulting in his adjudication in bankruptcy, and made false answers under oath on his examination to ascertain what property belonged to the estate, does not set forth the offense defined in Bankruptcy Act, § 29, as it fails to state that the bankrupt intentionally and fraudulently made a false oath.—In re Mayer, U. S. D. C., 195 Fed. 571.

11.——Lease.—The lien of a landlord on the property on the leased premises, must be enforced in bankruptcy on the tenant being adjudged a bankrupt.—In re Meyer, U. S. D. C., 195 Fed. 653.

12.——Preference.—Transfer of property by a debtor with intent to prefer creditors does not constitute an act of bankruptcy within Bankr. Act, § 3a, unless he is insolvent at the time of the transfer.—In re Kassel, C. C. A., 195 Fed. 492.

13.——Special Master.—A special master directed to take proof to make report on exceptions to a bankrupt's petition for discharge must exercise an independent judgment on the facts brought before him.—In re Mayer, U. S. D. C., 195 Fed. 571.

14.——Title to Property.—Title to property involved in bankruptcy proceedings remains in the bankrupt until appointment and qualification of trustee, when it relates back as of the date of the adjudication.—Christopherson v. Harrington, Minn., 136 N. W. 289.

15.——Trustee.—A trustee in bankruptcy has the rights of the bankrupt only as to property adversely claimed by a third person.—In re Walsh Bros., U. S. D. C., 195 Fed. 576.

16. **Banks and Banking**—Conditional Credit.—A bank taking a draft drawn by a seller of merchandise on the buyer for the price for collection, and giving the seller credit therefor, may when payment of the draft is refused charge the seller's account with the amount

and return the draft to him.—Merchants' Nat. Bank of Houston v. Townsend, Tex., 147 S. W. 617.

17. **Bigamy** — Indictment.—An indictment charging bigamy alleging a former marriage in a certain state was not insufficient for failing to allege the county in which the first marriage occurred.—Apkins v. Commonwealth, Ky., 147 S. W. 376.

18. **Bill of Lading**—Duplicate.—Where a bill of lading was executed by defendant in duplicate, and plaintiff's duplicate had been lost, a copy thereof was admissible without notice to produce the original.—Pittsburgh, C., C. & St. L. Ry. Co. v. Brown, Ind., 98 N. E. 625.

19. **Bills and Notes**—Attorney Fees.—A stipulation in a note for attorneys' fees of a specified sum fixes the amount of fees in the absence of plea and proof that the amount is unreasonable.—Miller v. Laughlin, Tex., 147 S. W. 711.

20.——Burden of Proof.—When the genuineness of a note is in dispute and the issue is that of forgery, the writing is not of weight and the burden of establishing its genuineness is on the plaintiff in the judgment.—Boyd v. Kirch, Pa., 83 Atl. 366.

21.——Condition Subsequent.—Where one gave a check to a tenant on the security of a chattel mortgage covering the lease and fixtures, he cannot stop payment of the check because the payee thereof failed to deliver the goods as agreed, since such failure was merely a breach of condition subsequent.—Cyclops Realty Co. v. Levy, 135 N. Y. Supp. 626.

22.——Holder.—A payee suing on the note in his possession showing his own indorsement has the right to have his indorsement stricken out.—Anderson v. Milburn Wagon Co., Tex., 147 S. W. 603.

23.——Indorsement.—An indorsement without recourse by the payee of notes secured by a chattel mortgage passes the ownership of the notes and the lien to the indorsee without any liability or guaranty of the payment of the notes on the part of the indorser.—Lissner v. Stewart, Tex., 147 S. W. 610.

24.——Protest.—A bank buying a draft by a seller and receiving an assignment of the bill of lading may not hold the seller liable on the failure of the acceptor to pay, without protest for nonpayment or suit therefor is brought within a proper time, and could not charge the drawer's account therewith.—Merchants' Nat. Bank of Houston v. Townsend, Tex., 147 S. W. 617.

25. **Boundaries**—Acquiescence.—Where a dividing line was recognized for more than 60 years, one of the parties, though openly claiming to a different line, was estopped to deny that the line as recognized was not the proper boundary.—Mosley v. Eversole, Ky., 147 S. W. 426.

26. **Brokers**—Custom.—To make a custom to the effect that each owner should pay one-half of the commission to a broker for effecting an exchange of property applicable as a binding custom, the broker must have acted as a middleman in the mutual interest of both parties, without being the particular agent of either.—Inman v. Brown, Tex., 147 S. W. 652.

27. **Carriers of Goods**—Rates.—Where cars of lumber were billed to point Q., "final destination 'S.,'" the contract was for shipment only to Q. where S. was on a new line which was not in operation, and to which no freight rates had been established at the date of the contract.—Quanah, A. & P. Ry. Co. v. Drummond, Tex., 147 S. W. 728.

28. **Carriers of Passengers**—Comfort.—A carrier of passengers must keep its cars supplied with such reasonable degree of heat as will keep its passengers in ordinary normal condition, in a reasonable degree of comfort.—Roark v. Missouri Pac. Ry. Co., Mo., 147 S. W. 499.

29.——Passenger.—An agent of an express company, entitled to ride on trains pursuant to a contract between the company and the railroad company, held a passenger while on the train in the discharge of his duties.—Missouri, K. & T. Ry. Co. of Texas v. Blalack, Tex., 147 S. W. 559.

30. **Chattel Mortgages**—Growing Grass.—Growing grass may be mortgaged as personal property, where owned by one not owning the land.—Davidson v. Osborne, 135 N. Y. Supp. 675.

31.——Parties.—The assignee of a chattel mortgage and the secured note could maintain an action thereon without joining the assignor, though the mortgaged debt was charged on the mortgagee's books as an account.—Wilson v. McCown & Co., Ark., 147 S. W. 451.

32.——Power of Sale.—A chattel mortgagee was bound to act in good faith in executing a power of sale upon default of the mortgagor, and to use every reasonable means to obtain the full value of the property and protect the mortgagor.—Lipsohn v. Goldstein, Mass., 98 N. E. 703.

33. **Contracts**—Abandonment.—Where one agreed to transport, erect and paint steel work at $6 per ton, to be paid in monthly installments as the work progressed, he could not recover any part of the contract price, where he abandoned performance before the first installment became due.—Homer v. Shaw, Mass., 98 N. E. 697.

34.——Damages.—A customer of a broker wiring acceptance of the broker's offer to hold coffee purchased for the customer immediately on receipt of the offer held to become the owner of the coffee, notwithstanding a delay in delivery of the broker's message, and hence, having suffered no loss, he had no right of action against the telegraph company.—Chesebrough v. Western Union Telegraph Co., 135 N. Y. Supp. 583.

35.——Illegality.—Where plaintiff agreed to sell timber to a company, for which it was to pay a certain sum which was less than its value, and to construct a railroad at a location beneficial to plaintiff by a certain time on a prescribed penalty, plaintiff could recover as against the defense that he was in pari delicto, as relief could be had without enforcing the alleged illegal part.—Herring v. Cumberland Lumber Co., N. C., 74 S. E. 1011.

36.——Nudum Pactum.—An agreement by an applicant for loan to pay expense of examination of security, if the lender should reject the application because of insufficiency of security, though a nudum pactum when made, held binding when the lender examined the property and rejected the application.—Peeples v. Citizens' Nat. Life Ins. Co., Ga., 74 S. E. 1034.

37.——Third Person.—A third person for whose benefit a contract is made may enforce it in an action in his own name.—La Crosse Lumber Co. v. Schwartz, Mo., 147 S. W. 501.

XUM

38. **Corporations**—Criminal Law.—Officers and directors of a corporation may be criminally liable where they are actually present, and efficient actors in committing the offense.—United States v. Winslow, U. S. D. C., 195 Fed. 578.

39.——Evidence.—In action against subscriber for corporate stock, books of corporation held competent as showing defendant to be a stockholder, and that he had not paid for his stock in full.—Fisk v. Sampson, Minn., 136 N. W. 315.

40.——Insolvency.—A creditor of an insolvent corporation need not recover judgment against it before suing its stockholders on their liability for unpaid subscriptions.—Schneider v. Johnson, Mo., 147 S. W. 538.

41.——Promoters.—Promoters of a corporation managing the work done in furtherance of the business in which the corporation when chartered will engage in held not liable as such to an employee engaged in the work.—Farmers' Gin & Milling Co. v. Jones, Tex., 147 S. W. 668.

42. **Creditor's Suit**—Solicitor's Fees.—Where a creditor recovers by suit a fund for the benefit of all the creditors, he is not entitled to have his solicitor's fees paid out of any surplus otherwise payable to the debtor after full payment of all the claims and costs.—Huff v. Bidwell, C. C. A., 195 Fed. 430.

43. **Criminal Law**—Appeal.—Where accused pleaded guilty in the municipal court, his appeal to the superior court, though vacating the judgment of the municipal court, did not change the issue or entitle him to a jury trial, and on the record nothing remained except to impose sentence.—Commonwealth v. Crapo, Mass., 98 N. E. 702.

44.——Attempt.—To constitute an attempt to commit a crime, there must be an intent to commit the offense, followed by an overt act or acts, in addition to mere preparation, tending, but failing, to accomplish it, though the acts need not be such that, if not interrupted, they would result in the crime charged; and if they are not remote, and are done with intent to commit the crime, and directly tend to accomplish it, they are sufficient.—State v. Dumas, Minn., 136 N. W. 311.

45.——Dying Declaration.—Dying declarations are admissible only where the person killed is the subject of a homicide charge and the circumstances of his death are the subject of the declarations.—Rhea v. State, Ark., 147 S. W. 463.

46.——Flight.—Evidence of accuseds' flight after they had been arrested and held to bail upon the same charge in another state was admissible in evidence on the question of guilt.—Commonwealth v. Goldberg, Mass., 98 N. E. 692.

47.——Good Character.—Good character is not of itself a defense for committing a crime, but should be considered by the jury along with the other evidence in determining the question of the defendant's guilt.—Rhea v. State, Ark., 147 S. W. 463.

48. **Customs and Usages**—Presumption.—Persons engaged in a particular trade are presumed to know the customs thereof; and contracts relating thereto are presumptively made with reference to such custom.—Holder v. Swift, Tex., 147 S. W. 690.

49. **Damages**—Penalty.—Where the rental value of a flat building was certain and capable of easy ascertainment, stipulation in the building contract for a forfeiture of $25 for each day of delay in completion of the building, will be regarded as a penalty, and not liquidated damages.—Walt v. Stanton & Collamore, Ark., 147 S. W. 446.

50.——Right to Recover.—The rule against recovery of damages where they are uncertain relates to uncertainty as to the cause rather than as to the measure or extent.—Thayer-Moore Brokerage Co. v. Campbell, Mo., 147 S. W. 545.

51. **Death**—Seven Years' Absence.—When a person disappeared and remained away unheard of for more than seven years, a presumption arose that he was dead, but there was no presumption that he died at any particular time during the seven years.—Johnson v. Sovereign Camp Woodmen of the World, Mo., 147 S. W. 510.

52. **Deeds**—Condition Subsequent.—A conveyance to trustees to erect a church thereon for the use of the members and imposing no restraint on alienation and containing no provision for forfeiture, held not to create a condition subsequent for the violation of which forfeiture will result.—Taylor v. Campbell, Ind., 98 N. E. 657.

53. **Depositions**—Notary Public.—The authority of a notary public to take depositions being of statutory origin, its scope is strictly limited by the statute and will not be enlarged by implication.—Ex parte Alexander, Mo., 147 S. W. 541.

54. **Descent and Distribution**—Partial Intestacy.—A legacy or devise to one who is an heir will not prevent him from taking as heir in case of partial intestacy, unless it is manifest that there is an intention to exclude him.—Bragg v. Litchfield, Mass., 98 N. E. 673.

55. **Eminent Domain**—Damages.—All considerations tending to give the land taken additional value, such as a projected bridge and an interurban railroad, held admissible as taking the measure of compensation.—Ft. Smith & Van Buren Bridge Dist. v. Scott, Ark., 147 S. W. 440.

56.——Police Power.—There is analogy between the powers of regulation and eminent domain to the extent that in both distinction between public and private uses lies in the character of the use.—Rutland Ry., Light & Power Co. v. Clarendon Power Co., Vt., 83 Atl. 332.

57.——Taking of Property.—Actual interference with or disturbance of property rights not causing merely consequential or incidental injury to property or property rights, as distinguished from a prohibition of its use or enjoyment, or a destruction of interests in the property, constitutes a "taking" of the property.—School Corporation of Andrews v. Heiney, Ind., 98 N. E. 628.

58. **Estoppel**—Mortgages.—Where property, which was subject to mortgages, was about to be sold upon foreclosure of the first, one who represented to the second mortgagee that he was the third mortgagee and agreed that, if the second mortgagee would refrain from bidding at the sale, he would, if he purchased the property, discharge the second mortgage, is, after having purchased the property, estopped from denying that he was the third mortgagee.—Delisi v. Ficarrotta, 135 N. Y. Supp. 653.

59. **Evidence**—Copies.—An attested copy of a deed was not inadmissible because the seal of the notary public who took the acknowledgment did not appear in the copy, where the certificate recited that the seal was actually attached.—Davis v. Seybold, C. C. A., 195 Fed. 402.

60.——Parol.—In an action on a note, testimony that it was delivered on a condition precedent was not inadmissible as varying the terms of a written instrument.—Keller v. Prince, 135 N. Y. Supp. 573.

61. **Executors and Administrators**—Probate Court.—The probate court may, on application at the same term, set aside its order approving an executor's final settlement so as to permit exceptions thereto, regardless of the merits of the exceptions.—McNally v. Hawkins, Mo., 147 S. W. 503.

62.——Redemption.—Where executrix, with her own funds, redeemed land from the mortgage debt of the testatrix, she held it for the benefit of creditors, regardless of the form of the conveyance to her, or of the fact that she had sold it to a third party.—Horton v. Robinson, Mass., 98 N. E. 681.

63. **Explosives**—Negligence.—A railroad company, which uses a dangerous explosive for torpedoes, must take every precaution to prevent personal injury to those rightfully on its premises from explosions which might be precipitated through the carelessness of its servants.—Jacobs v. New York, N. H. & H. R. Co., Mass., 98 N. E. 688.

64. **Fixtures**—Steel Tanks.—Steel tanks in a brewery essential to its operation eight feet in diameter, twelve feet high, of sufficient gravity to hold themselves in place, and removable only

by partial removal of a brick wall, constitute fixtures.—Detroit Steel Cooperage Co. v. Sistersville Brewing Co., C. C. A., 195 Fed. 447.

65.——What Are.—Where articles are permanently affixed to realty by one having a permanent estate in the land, the articles become fixtures.—Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House, Tex., 147 S. W. 629.

66. **Fraud**—Caveat Emptor.—An action for damages for false representations in selling goods cannot be grounded on representations coming within the rule of caveat emptor, which requires a buyer to exercise reasonable care to discover defects, but latent defects do not come within such rule.—Stratton v. Dudding, Mo., 147 S. W. 516.

67. **Habeas Corpus**—Substitute for Appeal.—When a federal question arises in a criminal case, it must be presented by exception at trial on the merits and be reviewed on appeal, and cannot be presented by habeas corpus after final determination of the case on appeal.—State v. Dunn, S. C., 74 S. E. 1014.

68. **Highways**—Negligence.—Where decedent's horse would not have shied and run away had defendant gas company exercised proper care to guard an excavation in the street, and there was no intermediate cause, defendant's negligence was the proximate cause of the injury resulting therefrom.—Helena Gas Co. v. Rogers, Ark., 147 S. W. 473.

69. **Homicide**—Automobile.—A driver of an automobile is guilty of manslaughter in causing a collision resulting in death if the collision was caused directly by such gross carelessness as to imply an indifference to consequences or by the commission of an unlawful act.—Luther v. State, Ind., 98 N. E. 640.

70.——Bystander.—In a prosecution for the killing of a bystander, whom accused shot in attempting to shoot his assailant, self-defense is a valid defense.—Jackson v. State, Tex., 147 S. W. 589.

71.——Dying Declarations.—Dying declarations are admissible only as to those things about which deceased would have been competent to testify as a witness.—Rhea v. State, Ark., 147 S. W. 463.

72. **Husband and Wife**—Action.—A wife has no cause of action against a third person for damages for negligent injuries to her husband, resulting in the diminution of his earning capacity and his consequent inability to comfortably support and maintain her.—Brown v. Kistleman, Ind., 98 N. E. 631.

73.——Contracts.—A married woman's contract for a purpose other than such as is expressly authorized by statute is void.—Thompson v. Morrow, Tex., 147 S. W. 706.

74.——Entireties.—While property held by husband and wife by entireties cannot be subjected by a subsequent creditor, it may be subjected where a husband already indebted invested his money in entirety property.—Schliess v. Thayer, Mich., 136 N. W. 365.

75. **Injunction**—Equity.—Where a court of equity has jurisdiction of the person of the defendants, it may restrain them from prosecuting actions in another state or a foreign country, although the actions involve property located in such other country.—Nelson v. Lamm, Tex., 147 S. W. 664.

76. **Insurance**—Forfeiture.—Where the initial insurance contract was a receipt for the first premium note, the insurance agreement was not affected by a condition in a policy which was not delivered providing that the insurance would be void on nonpayment of first premium when due.—Citizens' Life Ins. Co. v. Coleman, Ky., 147 S. W. 414.

77.——Receiver.—The obligations of a mutual fire insurance company, as well as those of its members, became fixed when it went into the hands of a receiver.—Parris v. Carolina Mut. Fire Ins. Co., S. C., 74 S. E. 1010.

78.——Stipulations.—Where a lienholder procured additional insurance without authority of the owner, who had procured a policy stipulating that it should be void if insured procured other insurance, the owner's policy was not void.—Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House, Tex., 147 S. W. 629.

79.——Valued Policy.—A "valued policy" of marine insurance is one which, for the purposes of the risk, fixes a definite value on the insured property, foreclosing dispute, no matter how high the valuation, except in a case of fraud or wager. An "open policy" is one where the value is not settled in the policy, and, in case of loss, must be agreed upon or proved.—Insurance Co. of North America v. Willey, Mass., 98 N. E. 677.

80. **Judgment**—Default.—A default judgment would not be set aside because of excessive damages awarded on an inquiry, unless the damages were so excessive as to indicate a bad motive.—Wylie Permanent Camping Co. v. Lynch, C. C. A., 195 Fed. 386.

81.——Evidence.—A previous decision of the Supreme Court that the evidence in a prosecution for an assault was sufficient to go to the jury on the question as to whether there was a right of self-defense held binding on an appeal to the appellate court in a civil action.—Brubaker v. Bidstrup, Mo., 147 S. W. 541.

82.——Findings.—The findings and judgment may be incorporated in the same instrument without making the finding a part of the judgment proper.—Judge v. Powers, Iowa, 136 N. W. 315.

83.——Res Judicata.—A party relying on a judgment as a bar must show such happenings at the former trial as will make it an adjudication of the issues on the present trial.—J. B. Sparrow Theatrical Amusement Co. v. Mack, C. C. A., 195 Fed. 474.

84. **Landlord and Tenant**—Contract.—A landlord's subsequent agreement to pay part of the cost of alterations, which the tenant leasing for ten years had agreed to pay if the tenant would retain possession for five years, held to be without consideration and unenforceable.—Loth v. Harris, 135 N. Y. Supp. 553.

85.——Eviction.—The act of a landlord in constructing an outside stairway to a barn built on the rear of a tenant's lot, permitting other tenants to pass over such tenant's lot, and filling the yard with building materials, etc., constituted a partial eviction of such tenant, so as to work a suspension of the entire rent, though the tenant remained in possession.—Kuschinsky v. Flanigan, Mich., 136 N. W. 362.

86.——Subletting.—To constitute acceptance by a landlord of an assignee as tenant, some act of the landlord inconsistent with continued liability of the old tenant and continued existence of any estate or interest in the lease to him must appear.—Ettlinger v. Kruger, 135 N. Y. Supp. 659.

87.——Surrender.—An express surrender of a lease must be supported by a consideration, and is usually required to be in writing.—Powell v. Jones, Ind., 98 N. E. 646.

88. **Libel and Slander**—Slander of Title.—A slander of title to the owner alone does not give rise to a cause of action.—Title Ins. Co. of New York v. Hawes, 135 N. Y. Supp. 608.

89. **Master and Servant**—Blasting.—One employed in blasting operations did not assume the risk of the negligence of his employer's superintendent in causing him to set off a charge from a point too near the place of explosion.—Marana v. McDonough, Mass., 98 N. E. 689.

90.——Burden of Proof.—In an action for death of a servant, the burden is on plaintiff to show not only that defendant was guilty of the negligence charged, but also that it caused decedent's death.—J. S. Young Co. v. State, Md., 83 Atl. 345.

91.——Fellow Servants.—A general contractor cannot escape liability for death of a subcontractor's bricklayer caused by negligent construction of staging on the theory that decedent and the man who constructed the staging were fellow servants.—Maguire-Penniman Co. v. Lombard, C. C. A., 195 Fed. 477.

92.——Proximate Cause.—Where the facts are such that the consequences attributable to the negligence of a master are within the field of reasonable anticipation, he is liable for an injury received by a servant in consequence thereof.—Yanike v. Chicago & N. W. Ry. Co., Wis., 136 N. W. 329.

93.——Rules and Regulations.—Where a rule has been habitually violated, with the knowledge and acquiescence of the employer, either express or implied, its violation by an employee is not contributory negligence.—Houston Stanwood & Gamble Co. v. Schneider, Ky., 147 S. W. 371.

94.——Vice Principal.—Where a servant is performing the master's absolute duties in making repairs, the master is not only responsible for the manner in which the repairs are made, but also for negligence in doing the work which renders the place unsafe for another servant.—Mortenson v. Hotel Nicollet Co., Minn., 136 N. W. 306.

95. **Mortgages**—Assumption.—The relation of suretyship existing between a mortgagor and his grantee, who assumed the mortgage, may be established in an ordinary personal action on the grantee's covenant brought by the mortgagor, who was compelled to pay a deficiency on foreclosure.—Halstead v. La Rue, Ind., 98 N. E. 638.

96.——Assumption.—A purchaser who expressly assumes prior existing mortgages is estopped to defend against foreclosure on the ground of usury, failure, or want of consideration, or any other ground.—Key West Wharf & Coal Co. v. Porter, Fla., 58 So. 599.

97. **Negligence**—Ordinary Care.—"Ordinary care," "ordinary skill," and "ordinary diligence," contemplate that degree of care, skill, and diligence, respectively, that an ordinarily prudent person would use in the transaction of his own business under like or similar circumstances.—Guitar v. Randel, Tex., 147 S. W. 642.

98.——Res Ipsa Loquitur.—To make the res ipsa loquitur doctrine applicable, the circumstances surrounding the accident must, without further proof, furnish sufficient evidence of defendant's negligence.—Hardie v. Charles P. Boland Co., N. Y., 98 N. E. 661.

99. **Partnership**—Evidence.—A partnership may be proved by circumstantial evidence.—Miller v. Laughlin, Tex., 147 S. W. 711.

100. **Payment**—Burden of Proof.—In an action to foreclose deeds of trust, where the execution of the notes and instruments was admitted, and defendant pleaded payments for which the petition did not give credit, it was an affirmative defense, casting the burden of proof on defendant.—Harrison v. Doyle, Mo., 147 S. W. 504.

101. **Pledges**—Sale of Collateral.—Where a pledgee is authorized, on failure to pay the debt, to sell the collateral, he cannot sell to himself; and hence an attempt to do so, being inoperative, is not an unlawful conversion, unless the pledgor was prejudiced by the notice of the first sale.—Liquidators of State Nat. Bank v. Hart, La., 58 So. 636.

102. **Principal and Agent**—Scope of Agency.—A purchaser whose payment to an agent, not authorized to collect, was never turned over to principal held liable to the principal for the amount purchased.—Sumrall v. Kitselman Bros., Miss., 58 So. 594.

103.——Undisclosed Principal.—Where a party did work under an agreement with an agent and solely on his credit with knowledge that he was an agent, he cannot hold the undisclosed principal liable.—Jablon v. Traynor, 135 N. Y. Supp. 545.

104. **Principal and Surety**—Burden of Proof.—One whose name appears on an instrument as principal or surety held required to prove that he signed as an attesting witness and that his failure to so indicate on the instrument was caused by his own mistake, or by the fraud of a party seeking to hold him liable as surety.—Green v. May, Ky., 147 S. W. 428.

105.——Negotiable Instruments Law.—Prior to Negotiable Instruments Law, extension of time to maker of a note for valuable consideration without surety's consent discharged him.—Lane v. Hyder, Mo., 147 S. W. 514.

106. **Railroads**—Crossing.—The safety gates at a railway crossing not having been closed as a train approached and passed, plaintiff, who observed the train, could not consider the open gates as an invitation to cross nor as an assurance that no train was approaching on another track.—Lane v. Northern Pac. Ry. Co., Minn., 136 N. W. 297.

107.——Licensees.—Where a railroad permits consignees to enter its yard to unload cars, and it was necessary for consignees to go diagonally across intervening tracks to get to their cars, the railroad is liable for the death of a consignee killed by the negligent operation of a train while diagonally crossing such tracks.—Boggess v. Biltimore & O. R. Co., Pa., 83 Atl. 356.

108.——Warning.—Independent of statute or ordinance, a railroad company must give reasonable and timely warning of the approach of its trains to the crossing of a public highway.—Lake Shore & M. S. Ry. Co. v. Myers, Ind., 98 N. E. 654.

109. **Sales**—Evidence.—Where a pump was alleged to have been warranted to give satisfaction and to be first class, evidence that the design of the pump was poor held admissible.—A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Company, Tex., 147 S. W. 717.

110.——Severable.—A contract for the sale of three cars of potatoes at a specified price per bushel is entire, and not severable because the seller shipped them at different times and drew a separate draft for the contents of each car.—Craig v. Lane, Mass., 98 N. E. 685.

111.——Warranty.—Where a contract for the sale of cane seed did not require it to be free from Johnson grass, the buyer's request that the seed should be free from that grass does not warrant the seller in repudiating the contract; the buyer not attempting to repudiate the contract, even if the request be refused.—Howe Grain & Mercantile Co. v. Taylor, Tex., 147 S. W. 656.

112. **Seduction**—Condonation.—In a prosecution for seduction, declarations of the prosecuting witness to other parties that she and accused were going to be married were competent to corroborate her testimony as to the promise of marriage.—State v. Pace, N. C., 74 S. E. 1018.

113. **Specific Performance**—Action for.—Where purchaser is aware of defect in title, or deficiency in subject-matter at the time of the purchase, he cannot, in suit for specific performance, recover compensation.—Moore v. Lutjeharms, Neb., 136 N. W. 343.

114. **Street Railroads**—Competition.—Traction companies may make valid operating agreements for the use by one of another's facilities where neither company thereby incapacitates itself from performing its duties to the public or tends unlawfully to stifle competition.—Evansville, S. & N. Ry. Co. v. Evansville & E. Electric Ry., Ind., 98 N. E. 649.

115. **Telegraphs and Telephones**—Negligence.—The acceptance of a telegram obligates the company to promptly transmit and deliver it, or notify the sender of impending delay.—Western Union Telegraph Co. v. Erwin, Tex., 147 S. W. 607.

116.——Non-Delivery.—Where the addressee of a telegram lived outside the delivery limits, but was in town within the limits on the day the telegram arrived, so that by diligence the message could have been delivered to him, the company was liable for nondelivery.—Postal Telegraph & Cable Co. v. Kelly, Ark., 147 S. W. 457.

117. **Vendor and Purchaser**—Fraud.—One induced by the fraud of a vendor to contract for the purchase of land may affirm the contract and recover the damages sustained.—Pierce v. Hellenic American Realty Co., 135 N. Y. Supp. 605.

118.——Rescission.—Where a purchaser before the time fixed for performance notifies the vendor that he will not perform, the vendor has an immediate right of action for damages.—Armstrong v. Dunn, Mo., 147 S. W. 509.

119. **Waters and Water Courses**—Prior Appropriation.—A second appropriator of water cannot be deprived by injunction of water which a prior appropriator did not need.—Biggs v. Miller, Tex., 147 S. W. 632.

120.——Riparian Owner.—A riparian owner has no right to have any certain amount of water flow on past his land even as against one irrigating nonriparian lands; his right being limited to that needed to irrigate.—Biggs v. Lee, Tex., 147 S. W. 709.

121. **Wills**—Construction.—An instrument, whereby one binds his heirs or personal representatives to pay a specified sum to a seminary to establish a professorship, to be paid at a specified date, and subject to deduction if the estate is insufficient to satisfy provisions made for the children of the person executing the instrument, and empowering the personal representative to satisfy the obligation in securities, is testamentary in character, and must be probated to have effect.—Louisville Trust Co. v. Southern Baptist Theological Seminary, Ky., 147 S. W. 431.